ordered to pay to the plaintiff the total amount of back payments of $254.00 per month, beginning with and including January 1963, allowing for any increases or decreases provided for by the Social Security Act, and monthly payments in the future at the same rate provided by law until such time as the plaintiff is found not to be entitled to such payments under the law. (SE) Eschbach: J (Copies to: Allen Sharp; A.W. Moellering)

3-1-66 Defendant files letter referred to as an exhibit in his petition filed 1-10-66, re: accrued benefits and approval of attorney fees, along with explanatory letter of transmittal.

3-14-66 Order entered re: Attorney Fees. (SE) Eschbach: J (Copy to Allen Sharp and U.S. Attorney)

4-19-66 Plaintiff files Notice of Appeal, together with cert. of service.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE
Civil No. 282

RAYMOND HOPKINS, Plaintiff,

—vs.—

ANTHONY J. CELEBREZZE, Secretary of Health, Education and Welfare, Defendant.

COMPLAINT IN ACTION TO SET ASIDE DECISION UNDER SOCIAL SECURITY ACT—Filed July 2, 1964

I

Jurisdiction of this Court is sought under the provisions of Title 42, Section 405(g), United States Code (42 U.S.C.A. §405(g)) and constitutes an appeal from the decision of the Hearing Examiner of the United States Department of Health, Education and Welfare, Social Security Administration, holding that plaintiff is not totally and permanently disabled within the provision of the Social Security Act.

II

This action is commenced within sixty days from the date that plaintiff was notified by the Department of Health, Education and Welfare, in the case of Raymond Hopkins, Claimant and Wage Earner, Social Security Account No. 305-05-2662, inclosing copy of Appeals Council's denial of his request for review of the Referee's decision on plaintiff's claim for a period of disability; said

notice from said Chairman being dated May 6, 1964, in which plaintiff was informed that his review of the Hearing Examiner's decision was denied and stands as the final administrative decision on his claim.

III

Plaintiff alleges that he has exhausted all of his administrative remedies prior to the filing of this appeal.

IV

Plaintiff's denial of request for review to the Office of Appeals Council, Department of Health, Education and Welfare was styled: Raymond Hopkins, Claimant and Wage Earner, Social Security Account No. 305-05-2662, Claim for Period of Disability and denial of request for review of hearing examiner, Jack G. Graham, dated November 27, 1963. The denial of request was dated May 6, 1964.

V

This action is instituted in the District Court of Northern District of Indiana in which the plaintiff resides. The plaintiff resides at RR #2, Williamsport, Warren County, State of Indiana, which is in Warren County, Indiana.

VI

The findings of fact by the Hearing Examiner and Appeals Council are not supported by substantial evidence.

The findings of fact by said hearing examiner and appeals council are contrary to law.

The conclusions of hearing examiner and appeals council are contrary to the facts.

VII

The plaintiff is totally and permanently disabled as a result of:

1. Gastritis and possible gastric ulcer.

2. Duodenal diverticulum.

3. Incisional hernia.

Wherefore, the plaintiff prays for review of the administrative determinations herein or in the alternative for the remand of this case for further consideration and review, and for all other proper relief in the premises.

/s/ ALLEN SHARP
Allen Sharp, Attorney at Law
Williamsport, Indiana
Telephone 762-3442
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Indiana,
Hammond Division at Lafayette.

Raymond Hopkins, *Plaintiff*, *vs.* Anthony J. Celebrezze, Secretary of Health, Education, and Welfare, *Defendant.*	Lafayette Civil No. 282.

ORDER AND MEMORANDUM OF DECISION—September 30, 1965

This matter is now before the court for disposition on cross motions for summary judgment filed by the defendant April 26, 1965, and by the plaintiff May 6, 1965. Judgment must be entered in favor of the plaintiff.

This action is an appeal to review the determination of the Hearing Examiner, acting under the authority of the Secretary of Health, Education, and Welfare, that the plaintiff's disability insurance benefits were properly discontinued as of December 31, 1962, under the Social Security Act, 42 U. S. C. §425. Review in this court, authorized by 42 U. S. C. § 405(g), is limited to questions of law involved in the Secretary's determination and to a con-

sideration of whether the Secretary's findings of fact are supported by substantial evidence in the record.

The plaintiff, an operator of power cranes and drag lines, was granted disability insurance benefits under the Social Security Act after he became unable to work on August 26, 1960 at the age of 52. The benefits became effective as of March 1961 and were terminated as of December 1962 on a determination by the Secretary that plaintiff was no longer "disabled" under the provisions of the Act. The termination of benefits was affirmed upon reconsideration. The plaintiff requested a hearing, which was held October 9, 1963. The Hearing Examiner affirmed the prior determination and the Appeals Council denied plaintiff's request for review on May 6, 1964. This timely appeal is taken from determination of the Hearing Examiner, which is also the final decision of the Secretary of Health, Education and Welfare.

The crucial question on review by this court is whether there is substantial evidence to support the finding that plaintiff's disability has ended. "Disability" is defined by the Act as "inability to engage in any substantial gainful activity by reason of any medically determinable physical . . . impairment which can be expected . . . to be of long-continued and indefinite duration." 42 U. S. C. § 423(c)(2). Judge Friendly, writing for the court in *Kerner* v. *Flemming*, 283 F. 2d 916, 921 (2d Cir. 1960), stated the issues involved in a determination of disability under this section:

> "Such a determination requires resolution of two issues—what can applicant do, and what employment opportunities are there for a man who can do only what applicant do? Mere theoretical ability to engage in substantial gainful activity is not enough if no reasonable opportunity for this is available."

In reversing the district court's affirmance of the Secretary's determination in a case similar to the instant case,

Judge Brown, writing for the court in *Butler* v. *Flemming*, 288 F. 2d 591, 595 (5th Cir. 1961), stated that the test of availability of employment within the applicant's competence was whether the evidence on the record contained "any indication of any specific work less exacting (than the work from which he is now foreclosed) within his residual competency and reasonably available as a prospective source of employment in the general area where he lives."

The exhibits at the hearing in the instant case included reports and letters from five doctors who had examined the plaintiff. The reports of two of the doctors were presented to the Department of Health, Education, and Welfare before the plaintiff was declared to be disabled and were the reports of the doctors who were treating the plaintiff as a patient. The reports of the other three doctors were presented after the original award and were made by doctors solely for the purpose of ascertaining whether or not the plaintiff's disability continued. These reports establish that the plaintiff became disabled by reason of a ventral hernia resulting from a gall bladder operation. Four attempts were made to repair the hernia, which is about the size of a human fist. An examination in February 1963 revealed that it exuded a "serum" that was apparently of superficial origin. In December 1963, Dr. Nelson stated that further attempts to repair the hernia would probably be futile and that improvement was unlikely. The Plaintiff has other physical difficulties, including almost complete blindness in his left eye.

The plaintiff has worked as a power crane or drag line operator in strip mines all his life except at one earlier time when he did some farm work. Plaintiff's testimony that he is unable to do farm work in his present condition is uncontradicted in the record. He has a seventh grade education and can read, write, and do simple arithmetic, although plaintiff testified he is not very good at arith-

metic. Joseph Ganns, a vocational rehabilitation expert, testified at the hearing that the plaintiff is "limited in transfer of skills."

While the general burden of proving disability is upon the applicant, he is not required to "go down the list and verbally negative his capacity for each (industrial occupation) or their availability to him as an actual opportunity for employment." *Butler* v. *Flemming, supra,* at 595. The record in the instant case contains evidence of the possibility of plaintiff finding employment in only three job areas. This does not include farming, which the record indicates without contradiction is not within applicant's competency. The plaintiff, according to Mr. Gann's evaluation, might be able to work as a truck driver or, if the medical conclusions of Dr. Levin are correct, at his former job as a crane operator if the lever controls are powered by more modern methods of electricity or air. The Hearing Examiner seemed to consider that plaintiff might also be able to drive a taxi, although Mr. Ganns declined to endorse that proposition.

Mr. Ganns' testimony that plaintiff might be able to drive a truck is not based on plaintiff's physical capabilities, but on a study of the transferability of skills of a person who has formerly been a crane operator. There is no evidence in the record that plaintiff is physically capable of driving a truck or a taxi. Likewise, there is no evidence that any such employment opportunities are reasonably available to a person with an unrepairable hernia as serious as that suffered by this plaintiff. Such jobs are generally accompanied by the lifting of the truck's cargo or the luggage of taxi passengers, the opening of taxi doors that requires much awkward reaching, and other physical exertions beyond the competency of this plaintiff. The Hearing Examiner cannot stretch inferences so far that evidence of transferability of skills can support a conclusion of

physical competency. There was no evidence that a transferability of skills exists from operating a crane to driving a taxi.

Nor is this court favorably impressed, to put it mildly, with the reasonableness of suggesting that a man who is blind in one eye should be asked, or even allowed, to seek employment as a truck driver or a taxi driver. There certainly is no evidence in this record to indicate that such a man is reasonably likely to find an employer willing to hire him as a truck or taxi driver. The vision requirements for obtaining a public passenger chauffeur's license from the State of Indiana almost certainly could not be met by a one-eyed man. The court finds that there is no evidence whatsoever to support the Hearing Examiner's finding that plaintiff has any practical opportunity to find employment driving a truck or a taxi.

If the Hearing Examiner's determination is to stand, it must rest on the reasonable availability to the plaintiff of employment in his former line of work. The Examiner's conclusion that such employment is available and within plaintiff's competency must rest upon the reports of Dr. Stanley Levin, an expert in internal medicine, and upon the testimony of Mr. Ganns. The record contains no other evidence to support such a conclusion.

It is significant that Dr. Levin nowhere states in his reports that plaintiff is capable of engaging in his former regular work. He does say it is his opinion that plaintiff can operate a crane, but only "if heavy exertion is not required to move the levers." The only evidence on the amount of exertion required is plaintiff's statement that pulling levers on a crane involved much more physical effort than shifting gears in a car, and the testimony of Mr. Ganns that operating levers in a "modern" crane required no more than fifteen pounds of arm pressure. The fact that plaintiff can operate an automobile gear shift

for short trips to town and back, or even that he is capable of pushing and pulling the levers on a "modern" crane does not support a finding that he can operate a crane. There is no evidence in the record indicating the capacity of plaintiff's arm pressure unless it is Dr. Levin's report that plaintiff cannot lift anything weighing more than five or six pounds. There is no evidence that Dr. Levin had ever moved the lever of a power crane or knew how much pressure was required to move one, and his opinion that plaintiff should be able to "operate levers" is not a substantial basis for the Examiner's conclusion that plaintiff was physically capable of operating the levers of a power crane as a full-time occupation. "Satisfaction of the claimant's statutory obligation to show that he is not able to do any substantial work is to be judged in a practical way." *Ratliff* v. *Celebrezze,* 338 F. 2d 978, 983 (6th Cir. 1964); *Kerner* v. *Flemming, supra.* The test for determining an applicant's competency and the availability of work, as stated by Judge Sobeloff, requires that the availability and the nature of the work be judged "in the light of what is reasonable and not of what is merely conceivable." *Thomas* v. *Celebrezze,* 331 F. 2d 541, 546 (4th Cir. 1964). On this record there is no evidence that plaintiff can reasonably work a power shovel on a full-time basis, or that there is any practical likelihood that he could find an employer willing to hire someone with all of plaintiff's physical limitations.

Dr. Levin reported that plaintiff "will not be able to do any bending beyond that ordinarily associated with sedentary occupation." The Examiner himself conceded at the hearing that a crane operator has to do some bending. Plaintiff's testimony is unchallenged that the lifting of cables is sometimes involved and that there are times when a crane operator may have to climb around on the machine to do repair work. Such activities are admittedly beyond

plaintiff's physical competency. Dr. Levin reported that plaintiff could not do climbing "which would require a moderate amount of strain." The Hearing Examiner suggested that plaintiff could use a ladder to climb the eight feet up to the crane once in the morning, and down again at night, as a means of circumventing plaintiff's lack of ability to climb onto the crane in the ordinary way. Neither the plaintiff nor Mr. Ganns had any idea whether an employer would object to the inconvenience that would be caused by such a method. Plaintiff agreed that he might be able to work levers and that he could climb up and down the proposed ladder once a day, but protested that there was much more to the job than those two operations. His testimony about the nature and details of the work is unchallenged throughout the entire record. A work activity report filed by a claims representative for the Secretary, and which is one of the exhibits in the record, describes plaintiff's inability to lift anything or to be "climbing around shovel and rig" as factors that have an effect on the quality of plaintiff's work as a crane operator. The same report stated that plaintiff "had to use hands and feet to control levers and operate shovels (diesel and compressed air) for controls and brakes." Mr. Ganns' testimony that plaintiff could "probably" operate the levers on "modern cranes" and climb up and down once a day and that plaintiff's ability to operate the levers depended on the body position is too speculative to support a finding that the plaintiff could reasonably and practically find and engage in work of this nature in view of his physical limitations. "There must be something more tangible establishing what employment opportunities there are for a man with his impairment." *Stancavage* v. *Celebrezze*, 323 F. 2d 373, 378 (3d Cir. 1963). "A theoretical ability to so engage is not enough if no reasonable opportunity is available." *Celebrezze* v. *Warren*, 339 F. 2d 833 (10th Cir. 1964).

The Hearing Examiner's question about the number of existing jobs for crane operators, directed to Mr. Ganns, was deliberately phrased to exclude any inquiry as to the practical availability of employment of crane operators in the construction industry for men with plaintiff's physical limitations. Mr. Ganns' answer, "Oh, yes, a lot of construction work is going on," casts no light on the availability of job opportunities for this plaintiff. "Since the abstract 'average' man is not the standard to be used, *Pearman* v. *Ribicoff*, 307 F. 2d 573 (4th Cir. 1962), there must be evidence to show the reasonable availability of jobs which this particular claimant is capable of performing." *Cyrus* v. *Celebrezze*, 341 F. 2d 192, 196-197 (4th Cir. 1965); *Ray* v. *Celebreeze*, 340 F. 2d 556 (4th Cir. 1965).

The evaluation by Judge Sobeloff of a case similar to the instant case is applicable here:

> "Employers are concerned with substantial capacity, psychological stability, and steady attendance; they will not unduly risk increasing their health and liability insurance costs. It is unrealistic to think that they would hire anyone with the impairment of this claimant." *Thomas* v. *Celebrezze, supra* at 546.

Plaintiff urges that the rejection of plaintiff's application for vocational rehabilitation by the Bureau of Old-Age and Survivors Insurance, the same bureau which terminated his disability benefits, should bind the Secretary in his determination of plaintiff's disability. The rejection was based on a determination by the Indiana Vocational Rehabilitation Division on March 28, 1963 that plaintiff's "impairment (was) too severe." This court does not need to reach that point in view of the findings above. The situation, however, poignantly illustrates the dilemma of a person considered by the same agency of government to be too disabled to learn a new job, yet not disabled enough to be entitled to his Social Security insurance benefits.

This court finds that there is no substantial evidence in the record to support the Secretary's finding that plaintiff's disability terminated as of December, 1962. There is abundant evidence in the record to establish that plaintiff is disabled within the meaning of the Act and the cases, even if such a conclusion were based solely on the reports and testimony upon which the Secretary sought to base his contrary conclusion. There is no apparent reason to remand the case or give the Secretary further opportunity to take testimony, and no such request has been made. The litigation has already consumed more than two and one-half years since plaintiff's benefits were terminated. *Cyrus* v. *Celebrezze, supra*; *Ratliff* v. *Celebrezze, supra.*

The decision of the Secretary of Health, Education, and Welfare terminating plaintiff's disability benefits as of December, 1962 is reversed. The Secretary is ordered to allow and pay disability benefits to the plaintiff from the time of their termination until such time as a new determination is made that plaintiff's disability has, in fact, terminated. The period of disability must include at least the period until the date of the hearing from which this appeal is taken.

Entered this 30th day of September, 1965.

JESSE E. ESCHBACH,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT.

PETITION TO DETERMINE ACCRUED BENEFITS AND PETITION FOR APPROVAL OF AGREEMENT FOR ATTORNEY FEES—Filed January 10, 1966

Raymond Hopkins, being first duly sworn upon his oath, respectfully represents to the Court as follows:

1. That heretofore on the 30th day of September, 1965, this Court entered its judgment in this case which judgment is hereby incorporated herein by reference.

The Court's particular attention is now directed to the following sentence of the Court's judgment, to-wit:

> "The Secretary is ordered to allow and pay disability benefits to the Plaintiff from the time of their termination until such time as a new determination is made that the Plaintiff's disability has, in fact, terminated."

2. That a notice of appeal was filed by the Defendant in this case on or about the 26th day of November, 1965, which notice of appeal was dismissed by the order of this Court on the 30th day of December, 1965.

3. That as shown at page 85 of the transcript originally filed in this cause at the time said benefits were terminated on the 31st day of December, 1962, Raymond Hopkins and Verna B. Hopkins, his wife, were receiving a monthly benefit in the sum of One Hundred Sixty-One Dollars and Forty Cents ($161.40) and there was an additional sum of $92.80 payable for the minor children of Raymond Hopkins and Verna B. Hopkins. That the total benefits paid and payable at the said time were Two Hundred Fifty-four Dollars ($254.00) per month. That as

shown by said determination of award at page 85 of said transcript, which determination was dated September 13, 1961 and approved September 14, 1961, the primary amount was in the sum of One Hundred Fifteen Dollars ($115.00). That effective January 1, 1965 there was a seven per cent (7%) increase in said benefits and the primary amount in this case would have been adjusted to approximately One Hundred Twenty-three Dollars ($123.00). That on the basis of the above and foregoing determination it is believed by the undersigned that between January 1, 1963 and the present time the undersigned claimant would be entitled to at least thirty-six (36) months of benefits at Two Hundred Fifty-four Dollars ($254.00) per month or a total of Nine Thousand One Hundred Forty-four Dollars ($9,144.00). In addition to this there would be a seven per cent (7%) increase for benefits accruing after January 1, 1965.

4. That on this 6th day of January, 1966, the Attorney for the undersigned claimant, namely, Allen Sharp, Williamsport, Indiana, conferred with the Deputy United States Attorney for the Northern District of Indiana, namely, Mr. Joseph F. Eichhorn, with reference to the amount of accrued unpaid and past due benefits payable pursuant to the order and judgment of this Court entered September 30, 1965. Said Mr. Joseph F. Eichhorn related to said Allen Sharp that on the basis of a communication from the office of the Attorney General of the United States that the Defendant Secretary of Health, Education and Welfare would pay the sum of Three Thousand Seven Hundred Forty-four Dollars and Eighty Cents ($3,744.80) as accrued past due and unpaid benefits in this case.

That in the month of December, 1965, representatives of the Defendant Secretary of Health, Education and Welfare, Social Security Administration Office, Danville, Illinois, requested of the undersigned claimant certain information with reference to his income and his condition since January 1, 1963. That the undersigned provided all requested information. That in substance the information

provided was to the effect that since January 1, 1963 the undersigned has earned no income and that his wife has earned no income and that his minor children have earned no income and that his physical situation with reference to disability has remained the same.

That the indicated determination of unpaid and accrued benefits by the Defendant Secretary of Health, Education and Welfare is not consistent with the order and judgment of this Court heretofore entered herein. That the Defendant Secretary should be ordered to pay disability benefits from January 1, 1963 until the present time. That there has not been a new determination that the Plaintiff's disability has, in fact, been terminated.

5. That at the time the undersigned Plaintiff engaged the legal services of Allen Sharp a written contract and agreement with reference to said services was entered into, the same being dated May 12, 1964, a copy of which agreement is attached hereto and incorporated herein by reference. That prior to the preparation and execution of said agreement the said Allen Sharp carefully examined certain court decisions with reference to attorney fees in such proceedings as these. In particular he examined the case of *Sheppard* v. *Flemming,* 189 F. Supp. 571; and *Sparks* v. *Celebrezze,* 228 F. Supp. 508. That this agreement was entered into and signed openly and freely by both parties prior to the enactment and effective date of Public Law 89-97, the effective date of which was July 30, 1965. Said Public Law 89-97 is found in Title 42, United States Code Annotated, 1965 Cumulative Annual Pocket Part at Section 406(b)(1).

That pursuant to said employment agreement said Allen Sharp has rendered efficient and faithful service, has advanced the sums for filing fee and other costs in this action, has made numerous trips to Lafayette, Indiana, has made numerous long distance calls to both the Social Security Administration Office in Danville, Illinois, to the Clerk of the U. S. District Court at Lafayatte, Indiana and to

the office of the United States Attorney in Fort Wayne, Indiana. That said Attorney has carefully examined the transcript in this case, has prepared numerous and extensive memorandum of law in this case, has spent many days in research in preparing memoranda and briefs. That subsequent to the filing of the notice of appeal by the Defendant in this case on November 26, 1965, said attorney spent one full day in the Library of the Chicago Bar Association examining briefs and records of appeal and other similar cases. That the undersigned believes that said fee agreement was fair at the time it was entered into and believes that it is fair now. That the undersigned prays the Court for an order approving said fee agreement.

Wherefore, the undersigned prays the Court for an order determining the amount of unpaid accrued disability benefits pursuant to the judgment and order of this Court entered September 30, 1965 and approving the agreement for employment and attorney fees entered into on the 12th day of May, 1964.

/s/ Raymond Hopkins.

MEMORANDUM.

The record speaks for itself with reference to the determination of benefits payable under the Court's order.

With reference to the matters of attorney fees the undersigned Attorney carefully examined the decisions with reference to the same at the time the employment agreement was entered into. At that time the court decisions were to the effect that a contingent fee contract could be entered into with reference to disability proceedings in United States District Courts.

There was no regulation as to the amount of fees at that time. In fact, in the case of *Sheppard* v. *Flemming*, 189 F. Supp. 571, which is cited with approval in *Cistalle* v. *Secretary of Health, Education and Welfare*, 238 F. Supp. 340 (1965) Western District of Louisiana, a contingent fee contract similar to the present one was approved. The undersigned attorney does not intend to violate the provisions of Public Law 89-97 which was effective July 30, 1965. Therefore, we desire the matter of attorney fees to be completely before the Court and would request the Court to approve the agreement of the parties if the Court is persuaded, as we are, that the limitation placed in Public Law 89-97 does not apply to an agreement made in good faith and openly and in accord with court decisions prior to the effective date of that Act.

Certainly we will abide any decision the Court makes in this regard.

We are also prepared to submit expert evidence to the Court with reference to the reasonable value of attorney fees should the Court desire to receive the same.

Respectfully submitted,

/s/ Allen Sharp.

Certificate of Service.

The undersigned certifies that on this 7th day of January, 1966, he deposited in the United States Mail at Williamsport, Indiana, postpage prepaid, a copy of the above and foregoing document properly addressed to Joseph F. Eichhorn, United States Attorney, Fort Wayne, Indiana.

/s/ Allen Sharp,
Attorney at Law,
Williamsport, Indiana,
Attorney for Plaintiff.

State of Indiana,
County of Warren, *ss.*

The above Petition was subscribed and sworn to before me, a Notary Public in and for said County and State, on this 7th day of January, 1966.

/s/ Allen Sharp,
Notary Public.

(Seal)

My Commission Expires April 9, 1966.

AGREEMENT FOR EMPLOYMENT—May 12, 1964

This memorandum of agreement made and entered into between Raymond Hopkins and Verna B. Hopkins, husband and wife, of Warren County, Indiana, First Parties, and Allen Sharp of Williamsport, Indiana, Second Party, Witnesseth that

Whereas the first party Raymond Hopkins has a disability claim now pending with the Social Security Administration and desires to pursue the same in court,

Whereas, Allen Sharp is an Attorney at Law, duly licensed to practice law in the State of Indiana,

Now, Therefore, it is agreed between the parties hereto as follows:

1. That the First Parties agree to employ the Second Party as Attorney to pursue this claim in the United States District Court and the United States Court of Appeals, if necessary. Said Attorney shall be compensated on the following basis:

a. In the event an award is awarded by decision of the United States District Court the Second Party shall be paid an amount equal to forty per cent (40%) of the benefits accrued from January 1, 1963 to the date of said award.

b. In event it is necessary to appeal to the United States Court of Appeals, said Second Party shall be paid an amount equal to fifty per cent (50%) of the benefits from January 1, 1963 to the date of said award.

c. That the Second Party agrees to use his best professional abilities and to give his best professional time to this claim.

In Witness Whereof, the Parties have hereunto set their hands and seals at Williamsport, Indiana, on this 12th day of May, 1964.

Raymond Hopkins, (Seal)
Verna B. Hopkins, (Seal)
First Parties,
Allen Sharp. (Seal)

APPENDIX V

14:PC7:PSA
305-85-2662-11A32, HC 3, 2

District Office,
Danville, Illinois,

January 24, 1966.

Mr. Raymond Hopkins,
Rural Route 2,
Williamsport, Indiana 47993,

Dear Mr. Hopkins:

We are writing about your claim for social security benefits.

It has been determined that you are still disabled. Therefore, you and your family will continue to receive benefit payments.

This action supersedes our previous determination and is in accordance with the decision of the United States District Court. If your condition improves or there is a change in your work status, however, you must notify us immediately.

Based on the recent amendments to the Social Security Act, you are entitled to receive $123.10. Your wife and the two children are each entitled to receive $51.50. These new monthly rates are effective beginning January 1965.

Section 206(b)(1) of the Social Security Act provides that our attorney may ask the court to approve a fee not to exceed 25 percent of past-benefits due you. We are, therefore, withholding the amount of $936.20, which represents 25 percent of your past-due benefits of $3,744.00 pending action by the court on the amount of the attorney fee. The amount withheld will be applied against the fee set by the court and will be mailed directly to your attorney; any remaining amount will be sent to you.

Benefit payments for you and your wife will continue to be combined. The next husband-wife check will be for $5,032.60. This represents payment for January 1963 through December 1965. You will receive this check within a few days. After that, the regular monthly check for $174.60 will be sent shortly after the month for which it is payable.

The children's check for the period of January 1963 through December 1963, in the amount of $3,463.50, will be sent to you shortly. After that, their monthly, regular check for $103.00 will be sent to you as usual.

If you have any questions with regard to your claim, you should get in touch with the district office shown on this notice. If you call in person, please take this notice with you.

Sincerely yours,

Bernard Popick,
Director, Bureau of Disability Insurance.

cc: Allen Sharp,
Attorney-at-Law.

IN THE UNITED STATES DISTRICT COURT.
For the Northern District of Indiana,
Hammond Division at Lafayette.

Raymond Hopkins,
Plaintiff,
vs.
John W. Gardner, Secretary of Health, Education and Welfare,
Defendant.

Lafayette Civil No. 282.

ORDER—March 14, 1966

Pursuant to the order of this court, entered February 1, 1966, the defendant has filed a memorandum showing the defendant's full compliance with the order of this court entered September 30, 1965. The plaintiff's memorandum, which was filed on January 31, 1966, but which did not come to the court's attention until after its order was filed on February 1, 1966, the following day, indicates that the plaintiff is entirely satisfied with the defendant's compliance. There remains only the question of a determination and certification of the amount of attorney's fees allowable to the plaintiff's counsel under § 206(b)(1) of the Social Security Act as Amended (Section 332 of P. L. 89-97), 42 U. S. C. A. § 406(b)(1) (Supp. 1965).

The plaintiff and his attorney entered into a contingent fee contract pertaining to this litigation. That contract was executed and this action was filed before the Social Security Act was amended to provide for the court's determination of counsel fee. However, the words of the statute provide for such determination "whenever a court renders a judgment favorable to a claimant" in a case of this nature. 42 U. S. C. A. § 406(b)(1) (Supp. 1965). It was apparently the intent of Congress to have such attorney's fees determined by the court in all appropriate judgments rendered by the court, not just in judgments entered in cases filed or relating to contracts executed subsequent to the effective date of the amendment to 42 U. S. C. § 406. Such legislation is unquestionably valid. *Fleming* v. *Rhodes*, 331 U. S. 100, 67 S. Ct. 1140 (1947); *Calhoun* v. *Massie*, 253 U. S. 170, 40 S. Ct. 474 (1920). United States district courts had validly exercised such power even before the congressional enactment of express authorization to determine attorney's fees. *Celebrezze* v. *Sparks*, 342 F. 2d 286 (5th Cir. 1965) affirming *Sparks* v. *Celebrezze*, 228 F. Supp. 508 (E. D. Texas 1964); and *Folsum* v. *McDonald*, 237 F. 2d 380 (4th Cir. 1956). The plaintiff's attorney himself has represented to this court that he was familiar with the decisions in the two *Sparks* cases, *supra*.

From the evidence in the record of this case, it is impossible for this court to determine the exact dollar amount of past-due benefits to which the plaintiff, Raymond Hopkins, himself is entitled from January 1963, the date of the termination of his benefits, until September 30, 1965, the date of the judgment of this case. This court therefore determines that the amount of attorney's fees to which the plaintiff's attorney is entitled is twenty-five per cent (25%) of the amount of those past-due benefits.

Accordingly, this matter having come before the court

pursuant to the petition of plaintiff's attorney for approval and allowance of a fee for representation before this court pursuant to Section 206(b)(1) of the Social Security Act as Amended (Section 332 of P. L. 89-97), it is ordered that a fee is hereby awarded to the attorney for the plaintiff in this proceeding in the amount of twenty-five per cent (25%) of the payment due to the plaintiff, Raymond Hopkins, from January 1, 1963 through September 30, 1965, which amount shall be certified by the defendant for payment by the Secretary of the Treasury directly to the attorney, Allen Sharp.

Entered this 14th day of March, 1966.

JESSE E. ESCHBACH,
United States District Judge.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

September Term, 1966—January Session, 1967.

No. 15724

RAYMOND HOPKINS,
Plaintiff-Appellant,

vs.

JOHN W. GARDNER, Secretary of Health, Education and Welfare,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

OPINION—March 15, 1967

Before HASTINGS, *Chief Judge,* and FAIRCHILD and CUMMINGS, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* This appeal, brought in reality by attorney Allen Sharp, involves Sharp's claim that the district court erroneously limited his fee for services in an action to review an administrative decision suspending insurance benefits under the social security act. The problem is the construction of a statute, enacted in 1965, authorizing the court to allow a reasonable attorney's fee where, in such action, a judgment favorable to a claimant is recovered, the fee not to be "in excess of 25 percent of the

total of the past-due benefits to which the claimant is entitled by reason of such judgment.'"[1]

The secretary contends that the statute applies to all judgments entered after the statute was enacted, and that the 25 percent maximum must be computed upon the total of the past-due benefits to which plaintiff was individually entitled. Sharp contends that the statute was not intended to apply in a case where the fee had been agreed upon before the statute was enacted, but that if it be applicable, the 25 percent is to be computed upon an amount which includes the past-due benefits to which plaintiff's wife and children were entitled, as well as plaintiff's own.

In 1961 and 1962, Raymond Hopkins was receiving disability insurance benefits under the social security act, and his wife and children were receiving the benefits provided by the act for the wife and dependent children of an individual entitled to disability insurance benefits. Late in 1962 the department notified Hopkins that it considered him able to do substantial gainful work and that December, 1962, would be the last month for which he and his wife and children would be entitled to benefits. Hopkins exhausted his administrative remedies, but the final decision was that his benefits had been properly terminated.

Hopkins brought this action to review. His wife and children were not named in either the proceedings for administrative review or as plaintiffs in this action. On September 30, 1965, the district court reversed the secretary's decision and ordered him to "pay disability benefits to the plaintiff from the time of their termination until such time as a new determination is made that plaintiff's disability has, in fact, terminated."

On January 24, 1966, the department wrote Hopkins that because it had been decided that Hopkins was still

1. 42 U. S. C. A. § 406(b)(1), Public Law 89-97, July 30, 1965.

disabled "you and your family will continue to receive benefit payments." Hopkins' individual past-due benefits through December, 1965, totalled $3,744.80, his wife's benefits $1,287.80, and the children's $3,463.50.

The district court awarded Sharp a fee of 25 percent of the past-due benefits payable to Hopkins individually, up to September 30, 1965, the date of the judgment.

The statute to be construed is as follows:

> "Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph."[2]

Paragraph (b) (2), enacted at the same time, makes it a misdemeanor to charge for services in connection with proceedings to which paragraph (1) is applicable any amount in excess of that allowed by the court.

1. *Application to the instant case.* Sharp and Mr. and Mrs. Hopkins signed a contract in May, 1964, in which the Hopkins employed Sharp to pursue the disability claim in court and fixed Sharp's compensation at 40 percent of the benefits accrued if awarded by the district court, without appeal, and 50 percent if it became

2. 42 U. S. C. A. § 406(b)(1), Public Law 89-97, July 30, 1965.

necessary to appeal. The complaint was filed July 2, 1964. The statute was enacted July 30, 1965. Most of the services had been rendered before that date. Judgment was rendered September 30, 1965.

Mr. Sharp relies on the rule of construction that "a law will not be construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application."[3] The judgment was rendered, however, after the statute was enacted, and the statute says "Whenever a court renders a judgment. . . ." Strictly speaking, application of this statute to a judgment rendered after its enactment is not retrospective. The retrospective impact results from the fact that this action was begun before the enactment, and that plaintiff and the attorney had agreed upon a fee before that. The same will be true with respect to many judgments rendered after enactment, though the proportion of time elapsed and services rendered before and after the enactment will vary widely. The difficulty of formulating any exception of already pending cases which would still serve the purpose Congress had in mind suggests that it was a deliberate choice to apply the new rule to all cases not yet terminated.

The report of a senate committee makes it plain that Congress was concerned about the charging of inordinately large fees, usually resulting from a contingent fee arrangement,[4] and it seems a very reasonable choice to make the remedy apply to all pending cases.

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3. 2 Sutherland, Statutory Construction 115 (3rd ed. 1943).

4. "It has come to the attention of the committee that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants in Federal district court actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half) of

The fourth circuit has held the statute applicable where judgment was entered after the enactment, notwithstanding the existence of a prior fee contract.[5]

We find no basis for any construction which would exempt the allowance of fee in the instant case from the application of the statute.

2. *The base upon which the 25 percent maximum is to be computed.* Mr. Sharp points out that although the past-due benefits for Raymond Hopkins individually, accrued to the end of 1965 (something less at date of judgment) were some $3,700, the judgment also determined, in actual though incidental, effect, that Mrs. Hopkins and the children were entitled to benefits, so that some $8,000 were the real total amount recovered for the Hopkins family as a result of Sharp's efforts. He contends that the 25 percent limitation should be computed upon the larger figure.

The key word is "claimant," as used in sec. 406 (b) (1). That statute operates "whenever a court renders a judgment favorable to a claimant," the claimant must have been "represented before the court by an attorney," and the maximum limit of attorney's fees is measured by a percentage of the benefits "to which the claimant is entitled by reason of such judgment." The word "claimant" is found in the preceding subs. (a), which deals with

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the accrued benefits. Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, are payable if the claimant wins his case.

"The committee bill would provide that whenever a court renders a judgment favorable to a claimant, it would have express authority to allow as part of its judgment a reasonable fee, not in excess of 25 percent of accrued benefits, for services rendered in connection with the claim; no other fee would be payable. . . ." S. Rep. No. 404, 89th Cong., 1st Sess. 422 (1965), U. S. Code Cong. & Admin. News 1965, p. 2062.

5. *Lambert* v. *Celebrezze* (4th Cir. 1966), 361 F. 2d 677, 679; *Redden* v. *Celebrezze* (4th Cir. 1966), 361 F. 2d 815, 816.

representation of claimants in administrative proceedings before the secretary.

Mr. Sharp would contend that "claimant" may be read in the plural and includes those whose right to what may be termed derivative benefits is established by the judgment in favor of one found to be entitled to what may be termed primary benefits. If Mr. Hopkins is the only "claimant," the district court correctly limited the fee to 25 percent of the past-due benefits accrued to him. If his wife and children are also "claimants," the district court might have allowed a larger fee, but not in excess of 25 percent of the past-due benefits accrued to all.

Under a strict construction of the words in the statute, no one could be a "claimant . . . who was represented before the court by an attorney" unless he were a plaintiff in the action. Here, the only plaintiff was Hopkins.

But while such construction would exclude the wife and children from the category of "claimant" in this case, because they were not plaintiffs, and hence would exclude their past-due benefits from the base on which the maximum attorney's fee would be computed, it would make the result depend on a procedural detail. Here the administrative decision under review terminated the payment of benefits to all four in the Hopkins family upon the single ground that Hopkins was no longer entitled, and all could have joined as plaintiffs. In many cases, although each beneficiary must make a separate application, it would be possible to make such application and have each applicant become a plaintiff in an action to review the administrative denials. It does not seem satisfactory, therefore, to rest our decision upon the proposition that a beneficiary is not a "claimant" unless he is a "plaintiff."

In broader terms, the question is whether "claimant"

under this statute includes all persons whose entitlement to benefits is established by the resolution of the issue before the court, in this case, Mr. Hopkins' disability, or whether "claimant" as used in the statute means only the applicant for primary benefits in any case where his entitlement is the issue.[6]

The fourth circuit has adopted the first construction, holding that "the statutory words 'past-due benefits to which the claimant is entitled by reason of such judgment' mean the entire group of benefits payable to the primary claimant on his own behalf and to him and other dependent members of his family on their behalf."[7]

We, however, with all respect to our brethren of the fourth circuit, choose the latter construction. We do so because it more closely limits fees, and such was the concern of Congress in enacting the statute. It also seems probable that those who drafted the statute assumed that where the dispute was over the entitlement of the individual applying for primary benefits, only he, and not those who would be entitled to derivative benefits, would appear as claimant before the secretary or as plaintiff before the court. The words they chose should be interpreted accordingly even though, as previously pointed out, it may be possible to have all interested beneficiaries formally pursue the administrative remedy and seek judicial review as plaintiffs. Furthermore, although "the time and labor required, the novelty and difficulty of the questions involved and the skill requisite

6. Even under the latter alternative, an applicant for derivative benefits would be deemed a "claimant" under some circumstances. For example the issue might be whether an applicant was as she claimed to be, the wife of an individual who was entitled to primary benefits.

7. *Redden* v. *Celebrezze, Lambert* v. *Celebrezze* (4th Cir. 1966), 370 F. 2d 373, 375, aff'g on rehearing *en banc* 361 F. 2d 815 and 361 F. 2d 677.

properly to conduct the cause" make up but one of the elements thought proper in determining a lawyer's fee,[8] this element is no greater in presenting an action to review denial of benefits to an applicant who is single and without dependents, than in presenting the same issues in an action where the applicant has a wife and children. We think it unlikely that Congress intended that in a case like this the maximum fee should be more than twice as large as it would have been if Mr. Hopkins happened to be single.

We consider the district court reached the correct decision, and the order appealed from is

AFFIRMED.

8. The others are: "(2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. . . ." ABA Canons of Professional Ethics No. 12.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Wednesday, March 15, 1967

Before Hon. JOHN S. HASTINGS, Chief Judge; Hon. THOMAS E. FAIRCHILD, Circuit Judge; Hon. WALTER J. CUMMINGS, JR., Circuit Judge.

No. 15724

RAYMOND HOPKINS, Plaintiff-Appellant,

vs.

JOHN W. GARDNER, Secretary of Health, Education and Welfare, Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

JUDGMENT—March 15, 1967

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Friday, April 21, 1967.

Before:

Hon. John S. Hastings, *Chief Judge,*
Hon. Elmer J. Schnackenberg, *Circuit Judge,*
Hon. Win G. Knoch, *Circuit Judge,*
Hon. Latham Castle, *Circuit Judge,*
Hon. Roger J. Kiley, *Circuit Judge,*
Hon. Luther M. Swygert, *Circuit Judge,*
Hon. Thomas E. Fairchild, *Circuit Judge,*
Hon. Walter J. Cummings, Jr., *Circuit Judge.*

Raymond Hopkins,
Plaintiff-Appellant,
vs.
No. 15724
John W. Gardner, Secretary of Health, Education and Welfare,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

IT IS ORDERED by the Court that the petition for a rehearing *en banc* of this cause be, and the same is hereby, DENIED.